Chang et al v. Virgin Mobile USA LLC et al Doc. 65

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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| SUSAN CHANG, AS NEXT FRIEND OF ALISON CHANG, A MINOR, AND JUSTIN HO-WEE WONG, | § § § | |
| Plaintiffs, | § § | |
| V. | § § | CA No. 3:07-cv-1767 |
| VIRGIN MOBILE PTY LTD., | § § | |
| Defendant. | § | |

**DEFENDANT VIRGIN MOBILE (AUSTRALIA) PTY LTD.'S FINAL REPLY TO PLAINTIFFS' SUR-REPLY TO DEFENDANT'S MOTION TO DISMISS**

Defendant Virgin Mobile Pty Ltd. ("Virgin Australia") files this Final Reply to Plaintiffs Susan Chang, as next of friend of A.C. ("Chang" or "A.C.") and Justin Ho-Wee Wong's ("Wong") (collectively "Plaintiffs") Sur-Reply to Virgin Australia's Motion to Dismiss based on lack of personal jurisdiction and improper service of process.[1] As discussed in Defendant's Motion to Dismiss, Reply and Final Reply, the Court should grant Defendant's Motion to Dismiss in its entirety.

## I. PLAINTIFFS' UNPLED AGENCY THEORY IS EQUALLY UNAVAILING TO PROVE PERSONAL JURISDICTION.

Only after the Defendant pointed out the obvious - that not one of Defendant's depositions, interrogatory answers, document production responses or admission answers was attached in support of Plaintiffs' opposition brief[2] - do they now attach some evidence to their

[1] Plaintiffs have not addressed the improper service of process issue created by their serving through the Texas Secretary of State a defendant that is not conducting business in Texas.

[2] Notwithstanding their latest attempt to craft an unpled agency theory out of tangential vendor relationship(s), Plaintiffs' continuing diversionary argument about jurisdictional discovery rings hollow. It was not through inadvertence that Plaintiffs omitted Defendant's discovery answers, responses and testimony. Plaintiffs did not include that evidence because it did not support and in fact, was inapposite to, Plaintiffs' conclusory pleadings.

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sur-reply. Unfortunately, the recipe for Plaintiffs' new unpled jurisdiction-by-agency theory[3] is no different than their original opposition, which also missed an important ingredient, namely facts. What evidence is attached to Plaintiffs' sur-reply shows unequivocally that Host was a vendor for Defendant, and The Glue Society was a sub-vendor to Host. Virgin Australia merely paid for an Australian vendor/sub-vendor's turn-key production of a finished advertisement that was selected from a group of other proposed finished advertisements, and then utilized exclusively in Australia.

## II. PLAINTIFFS ARE WRONG ABOUT AGENCY LAW.

Plaintiffs' unpled agency theory fails by definition. "The **right to control** a person in the details of the work is the **essential inquiry** in determining whether a relationship is that of agency or independent contractor." *Francisco Flores, et al. v. A.C. Inc., et al.*, 2003 U.S. Dist. Lexis 3693, at *20 (W.D. Tex. Mar. 5, 2003) (emphasis added), citing *Daily Intern Sales Corp. v. Eastman Whipstock Corp., Inc.*, 662 S.W.2d 60, 64 (Tex. App.—Houston [1st Dist.] 1983, no writ.) What Plaintiffs have failed to consider is, "[e]ven though one acts for and on behalf of another, if he is not under that other person's control, the agency relationship does not exist." *Id.*, citing *Page v. Boone's Transp., Ltd.*, 1998 ME 105, 710 A.2d 256, 257 (Me. 1998); *Daily Intern Sales Corp.,* 662 S.W.2d at 64.

As set forth in the same deposition passages that both Plaintiffs and Defendant cited, Australian vendor Host[4] and its Australian sub-vendor **independently** created, designed, developed and delivered the finished advertisements at issue in Australia. There is no evidence cited by Plaintiffs, because none exists, that Virgin Australia did anything other than select from

[3] Defendant does not waive, and in fact maintains, its objection to any unpled theory or cause of action, including without limitation, Plaintiffs' latest agency theory.

[4] The undisputed testimony shows that Virgin Australia's relationship with Host was as a vendor, not as an agent. *See* Deposition of David Cain taken on April 23, 2008 ("Cain Depo.") at p. 13, l. 21- p. 14, l. 1, APP 5-6.

a group of 40 finished advertisements presented to it in Australia. Simply put, neither Host nor The Glue Society were acting under the direction or control of Virgin Australia. Rather, Host and The Glue Society were both independent contractors, and no agency relationship was created.

In essence, Plaintiffs seek to first place an "agency" label on Host and its sub-vendor, then extrapolate backward to argue that Virgin Australia empowered Host's sub-vendor to act for Virgin Australia to secure an image[5] for an advertisement to be created in Australia.[6] As the *Francisco Flores* court stated, an agency relationship cannot be presumed to exist, and the principal alleged to have the agency relationship must have the right to control both the means and details of the actions by the alleged agent. *Id.*, citing *Lyons v. Lindsey Morden Claims Mgmt., Inc.*, 985 S.W.2d 86, 90 (Tex. App.-- El Paso 1998, no pet.). As documented ad nauseum, Host and its sub-vendor independently created, designed, developed and delivered the finished advertisements, complete with image and slogan. *See* Cain Depo. at p. 16, ll. 3-5, APP 7; p. 19, ll. 2-12, APP 8; p. 32, ll. 11-14, APP 9; and p. 35, ll. 17-20, APP 10.

The facts are clear this case. Virgin Australia and Host entered into an informal agreement to provide several turn-key advertisements, which "does not establish that an agency relationship exists." *Francisco Flores*, 2003 U.S. Dist. Lexis 3693, at *21. At no time did Virgin Australia instruct Host or The Glue Society on how or where to locate an image or what image to use. Indeed, the evidence is clear that Host's sub-vendor, The Glue Society, independently decided to use Flickr and independently selected the pictures on Flickr. Also, Virgin Australia did not control the day-to-day activities or affairs of either Host or The Glue Society. Instead, Virgin Australia controlled only the acceptance of the end result (the finished advertisement) that was to be accomplished. Thus, no action on the part of Virgin Australia, Host, or The Glue Society substantiates, let alone indicates, the creation of an agency relationship for the Australia-centered activities at issue.

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[5] As previously discussed in Virgin Australia's reply (n. 1), Yahoo!'s Shannon Chance Baylor has **no** knowledge of whether Plaintiff A.C.'s image was in fact ever stored in Texas, let alone processed or transmitted in or from Texas during some undefined time period.

[6] As noted in Virgin Australia's reply, Plaintiffs' "evidence" amounts to describing some type of alleged **outbound** activity to Australia (not **inbound** to Texas) from an undetermined cyberspace location.

Plaintiffs have also failed to address one of the facts that undermines their entire theory of personal jurisdiction, assuming, *arguendo,* that Virgin Australia procured its own images and designed and developed its own advertising campaign (which it did not). The one alleged activity at issue is **outbound** to Australia, again even assuming that Texas was the state of origin. A purchase is insufficient to confer personal jurisdiction. *Valley Dynamo v. Warehouse of Vending & Games*, 168 F. Supp. 2d 616, 620-21 ( N.D. Tex. 2001). In *Valley Dynamo,* the court stated that the "law is clear that mere purchase of merchandise is not sufficient to warrant the inference that a corporation is present within the jurisdiction of the forum state." *Id.* at 620-21. If a purchase is insufficient to confer personal jurisdiction, certainly Virgin Australia's alleged gratuitous receipt of an image in this case cannot confer personal jurisdiction.

Further, Virgin Australia has no affiliation with the vendor and sub-vendor, and is in fact two companies removed from the process of downloading the subject image from the Flickr website (which, despite three extensions of discovery, has not even been found to reside on a Texas server); *see also, Olympia Capital Associates, L.P. v. Jackson,* 247 S.W. 3d 399, 414 (Tex. App.- Dallas 2008, no writ) (citations omitted) (proper exercise of personal jurisdiction may **not** be based solely on contacts with forum state of another corporate entity with which defendant may be affiliated).

Plaintiffs' argument of agency by ratification also fails. It is black-letter agency law that "[w]ithout evidence of any kind of agency relationship, the doctrine of ratification is inapplicable." *Flores*, 2003 U.S. Dist. LEXIS 3693, at *25. As discussed above, Plaintiffs have submitted no credible evidence that any agency relationship existed between Virgin Australia and Host or The Glue Society. Therefore, ratification cannot apply in this case.

## III. CONCLUSION.

Virgin Australia has shown that it is not subject to personal jurisdiction anywhere in the U.S., including in Texas, based on either specific or general jurisdiction. Moreover, this Court's exercise of personal jurisdiction over Virgin Australia would not comport with traditional notions of fair play and substantial justice. Further, it is clear that Plaintiffs also failed to properly serve Virgin Australia under federal or state law. Thus, under Fed. R. Civ. P. 12(b)(2) and (5), Virgin Australia requests that the Court grant its motion to dismiss in its entirety.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT
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## CERTIFICATE OF SERVICE

I hereby certify that, on the 29th day of August, 2008, I electronically filed the foregoing "Defendant Virgin Mobile (Australia) Pty, Ltd.'s Final Reply to Plaintiff's Sur-Reply to Defendant's Motion to Dismiss" with the Clerk of Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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